IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 181

AARON ROTH,

Petitioner,

vs.

LOCAL No. 1460 OF RETAIL CLERKS UNION, RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, THOMAS DAY, and VERNON HOUSEWRIGHT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA (EMBODYING BRIEF).

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STATEMENT OF MATTER INVOLVED.

This is not primarily a labor case, as its title might indicate. Rather, petitioner asserts that the Indiana Supreme Court has *discriminated* against him by stating *non-existent facts* against him in its opinion, so as to

deprive him and his property of the equal protection given by Indiana law to other citizens similarly situated. The grievance he presents is so fundamental as to merit serious inquiry by this Court.

Petitioner, a small grocer, had three clerks who were originally forced to join the respondent Local Union by the Union's coercion and threats against them. They escaped from the Union at the first opportunity by orally repudiating it, which they subsequently confirmed by sending a written resignation to the Union. The Union picketed petitioner for the sole and avowed purpose of compelling him to sign a contract agreeing to compel his employees to rejoin the Union they hated, against their will, or be discharged from their jobs. There was no finding or evidence that the Union sought to picket for the purpose of advertising or conveying information. On the contrary, its own international representative (respondent Housewright) admitted in his testimony that the sole object of picketing was to compel petitioner to sign said agreement to coerce his employees. He refused to sign. He informed the employees that they could do as they pleased about joining and that it made no difference to him. The picketing, though non-violent, falsely stated to the public that he was "Unfair" to the Union, and so damaged his business that it would be completely destroyed in a short time without injunctive relief.

Petitioner sued in the state trial court for temporary and permanent injunction under the Indiana labor injunction statute (which is a replica of the Norris-LaGuardia Act, but which the Indiana Supreme Court has construed more favorably to employers than the Norris-LaGuardia Act has been construed in the Federal Courts). The trial court refused to grant an effective temporary injunction,

so petitioner appealed to Indiana Supreme Court, resulting in the following decision:

Roth v. *Local Union, etc.* (Dec. 22, 1939), 216 Ind. 363, 24 N. E. (2d) 280 (R. 18), which reversed the trial court, mandated entry of a temporary injunction prohibiting the picketing, and construed the Indiana statute to mean as follows:

> "The statute here under consideration declares that it is the public policy of this state that the *individual unorganized worker shall be free to decline to associate* with his fellows and that he shall be free from interference, restraint, or coercion on the part of his employer. This must mean that *no labor union may demand that an employer require his employee to join such union,* because no employer has the right to require an employee to join or refrain from joining a union. *Any person or group* which undertakes to coerce an employer to do that which is contrary to the express public policy of this state thereby undertakes to compel the performance of an *unlawful act.* The lawful weapon of peaceful picketing may not be utilized to accomplish *such an unlawful purpose.* It is quite immaterial that the things done to bring about the unlawful purpose were not *per se* unlawful. *This is our interpretation of our statute.*"
>
> *Roth* v. *Local Union, etc.*, 216 Ind. 363, 370 (top), 24 N. E. (2d) 280, 283 (top 1st column).

Thereafter, trial was had on the permanent injunction issue and permanent injunction was granted, from which the Union appealed to the Indiana Supreme Court, resulting in the following decision:

Local etc. Union v. *Roth* (Feb. 24, 1941), 218 Ind. 275, 31 N. E. (2d) 986 (R. 41), which reversed the trial court and ordered a new trial of the permanent injunction, on the ground that certain evidence tended to indicate that the employer may have coerced his employees to send said

written resignation to the Union, merely because he had handed one of them a written form suitable for that purpose, which the employees already desired. A reading of that opinion discloses that it strains at a gnat and swallows a camel,—strives to accuse the employer, on the flimsiest pretext, of coercing his employees, while placing the court's blessing on the actual and gross coercion practiced on them by the Union. But the effect of that decision was merely to order a new trial, so no petition for certiorari could be prosecuted from it.

Thereafter, a new trial was had in the trial court, with the employees themselves testifying, and the trial court inquired with painstaking care into the question of whether petitioner had coerced his employees as imagined in the previous opinion, after which the trial court made written findings of fact showing that this accusation was groundless and preposterous.

See: Finding No. 4 (R. 49).

Said finding was based upon:

(1) *Uncontradicted testimony* of the employees: (R. 58-91).

(2) *Total absence* of evidence to show any guilt of petitioner;

(3) *Admission* of the Union's international representative (respondent Housewright) in his testimony that the sole cause of the picketing was to coerce petitioner to sign the unlawful contract, rather than any grievance against petitioner for allegedly causing resignations. (R. 113, top.)

Not only did the above finding and admission of respondents exonerate petitioner of this fictitious charge

in the previous opinion, but the answer of respondents had made no such charge against him. (R. 7, 8, top.) In the absence of such answer, under Indiana law, a judgment cannot be rendered by the trial court or Supreme Court on a non-existent issue, whether law or equity. (*Boardman* v. *Griffin*, 52 Ind. 101, 106; Secs. 2-101, 2-1015, 2-1024, Burns' Ind. Statutes 1933.)

On the basis of the above findings, evidence and issues, showing petitioner to be innocent, the trial court, at the close of the new trial stated conclusions of law reciting that, under the true facts, petitioner was entitled to a permanent injunction under the rule of law laid down in the Indiana Supreme Court's opinion in the first appeal on the temporary injunction (*Roth* v. *Local Union*, 216 Ind. 363, 370, *supra*), which rule of law construing the Indiana statute has never been reversed or modified. (See R. 51 for conclusions.) After which the trial court entered a permanent injunction. (R. 53.) Respondents appealed again to the Indiana Supreme Court, resulting in the following decision:

Local etc. Union v. *Roth* (March 5, 1942, not yet printed in official reports), 39 N. E. (2d) 775 (R. 117), which again reverses the trial court with instructions to enter final decree against petitioner. This opinion simply repeats the Supreme Court's accusation, even flimsier than in the previous opinion, that petitioner coerced his employees. The opinion turns both petitioner and his employees over to the vengeance of the Union, under the pretext of protecting the employees from the imaginary coercion of petitioner. The opinion recites that the present evidence is substantially the same as on the last preceding appeal, which if true merely shows that the Supreme Court deprived petitioner of his constitutional

rights when it wrote the preceding opinion. However, the effect of the previous opinion was exhausted when a new trial was had. Petitioner has brought up all the evidence on the new trial, and the question is not whether the preceding opinion was wrong, but whether the present judgment of the Indiana Supreme Court can stand on the present record.

Petitioner is aware that this Court will not weigh or consider *conflicting* evidence, but he relies on the well recognized and *necessary* exception: that where the highest court of a state bases its judgment on a non-existent fact, contrary to all the evidence and record, this Court will review the latter question to prevent a citizen from being denied equal protection of the state law, and to prevent him from being deprived of liberty or property without due process of state law; otherwise these rights could always be circumvented by the device of stating non-existent facts against the citizen.

When the Indiana Supreme Court rendered the last cited opinion and judgment, petitioner presented these constitutional errors to that court by petition for rehearing, as was his absolute right under its Rule 2-22, which petition was entertained by the court and denied on March 26, 1942. (R. 119-122.)

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is based upon *Judicial Code, Sec. 237, amended* (being Title 28, Sec. 344, F. C. A.; being also R. S. Secs. 690, 709), which enables this Court to review the highest court of a state in cases

> "where any title, *right, privilege,* or *immunity* is specially set up or claimed by either party under the Constitution;"

which petitioner did in the Indiana Supreme Court (R. 119-122), said court being the highest court in Indiana in which a decision could be had (Art. 7, Secs. 1-4, Ind. Constitution).

Petitioner contends that the Indiana Supreme Court's decision and judgment complained of, deprive him of the equal protection of the law of Indiana and deprive him of liberty and property without due process of law of Indiana, contrary to the 14th Amendment of the Constitution of the United States (said Indiana law being Secs. 40-501 to 40-514, Burns' Indiana Statutes, 1933; otherwise known as Acts 1933 Indiana, General Assembly, Ch. 12).

Said deprivation consists of the fact that the Indiana Supreme Court based its said decision and judgment upon its own finding of *fictitious and non-existent facts*, which are not supported by any evidence and are contrary to the undisputed evidence and record, whereby its opinion falsely brands petitioner as a law-breaker. On the basis of this false accusation and premise, the decision denies him the rights given by said law to other Indiana citizens similarly situated; thereby enabling this Court to examine the true facts under the following rule:

"And this Court *will* review the finding of facts

by a State Court where a Federal right has been denied as the result of *a finding shown by the record to be without evidence to support it;* or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Northern Pac. R.* v. *North Dakota,* 236 U. S. 585, 593, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 394; 45 S. Ct. 129, 69 L. Ed. 342, and cases cited."

Fisk v. *State of Kansas,* 274 U. S. 380, 385 (bottom), 71 L. Ed. 1104, 47 S. Ct. 655, 656 (bottom 2nd column).

THE QUESTIONS PRESENTED.

A comparison of the false accusations of fact made against petitioner in the opinion (*Local etc. Union* v. *Roth,* not officially reported, 39 N. E. (2d) 775) with the undisputed facts of record, plainly shows that the opinion and judgment of the Indiana Supreme Court violates petitioner's constitutional rights as follows:

(1) Denies petitioner equal protection of the Indiana law, by means of falsely painting him as a law-breaker so as to exclude him from the protected class, contrary to:

14th Amendment, U. S. Constitution.

(2) Deprives petitioner of property without due process of law, by adjudging that his property be exposed to admitted certain destruction at the hands of respondents, and predicating this judgment (of the Indiana Supreme Court) upon the false and non-existent fact that petitioner is a law-breaker. Basing

a judgment on false facts is denial of due process, contrary to:

14th Amendment, U. S. Constitution.

(3) Compels the now-innocent petitioner to become a law-breaker in the future in order to prevent destruction of his property. He must either: (a) obtain private relief by forcing his employees to re-join the Union against their violent objection, which will cause the Union to stop picketing but which will be a violation of the statute as construed in the first opinion, 216 Ind. 263; or (b) not force his employees to re-join, which will cause the Union to picket him to destruction, but which will be complying with the law. Any state court decision which compels an innocent man to turn law-violator in order to prevent property destruction, constitutes denying equal protection, depriving of property without due process, and depriving of liberty without due process, contrary to:

14th Amendment, U. S. Constitution.

What has just been said in paragraph (3) would be true even if petitioner had violated some law in the past. A state court cannot send a past violator out with an implied command or invitation to break the law a different way in order to save his property. This is contrary to the *14th Amendment.*

(4) Exposes petitioner's property to destruction without limit of value and without regard to the trivialty of his alleged law violation. This amounts to denial of equal protection, and deprives of property without due process, contrary to:

14th Amendment, U. S. Constitution.

(5) Permits respondents to destroy petitioner's property as a means of accomplishing their unlawful object against his employees (to force them to re-join the Union, which the first opinion in 216 Ind. 263 says is an unlawful thing for the Union to do). This deprives petitioner of property without due process, contrary to:

14th Amendment, U. S. Constitution.

(6) Permits respondents to force petitioner to participate in their unlawful scheme of coercing the employees, under penalty of having his property destroyed. This is contrary to:

14th Amendment, U. S. Constitution.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

False Accusation Against Petitioner in Opinion as Excuse for Denying Him Relief:

The last opinion, *Local etc. Union* v. *Roth*, 39 N. E. (2d) 775, adopts the following statement as the Indiana Supreme Court's summary of the facts in this case, and makes that statement the cornerstone of its decision:

> "The employer had *interfered* and aided and *encouraged* his employees to sever their connection with the union." (Our italics.)
>
> 29 N. E. (2d) 775, 776, par. 1.

And the opinion also adopts by reference the accusations made in the preceding opinion, which said:

> "But the fact is that *he has not been law abiding* with respect to the *statute*. He has interfered and intermeddled; he has encouraged, if not *coerced*, his employees, which conduct is a *violation of the statute* upon which he relies for protection against picketing. * * *" (Our italics.)
>
> *Local etc. Union* v. *Roth*, 218 Ind. 275, 281 (bottom), 31 N. E. (2d) 986, 989.

All the evidence in the record on the above subject was furnished by the employees themselves, whose testimony we condense in narrative form as follows so far as pertains to this subject. (Respondents can hardly complain about the accuracy of this summary because we have copied it almost verbatim out of their own brief in the Indiana Supreme Court):

Dorothy Carlson (R. 84-91):

> "I am the Dorothy Carlson who testified in the previous trial of this case. On the morning that this picketing started, one of the union agents came to me

and talked to me in the store and told me if I didn't get out and picket it would mean that there would be a $50.00 fine to *get back into the union.* He requested me to go out on strike and to picket. *I told him I absolutely would not.* I was under *no fear* of what my *employer* might do or want me to do. This statement was of my own free will and accord. (R. 84-85.)

"I kept right on working while the picketing was going on, for I understood from the time that the statement was made that it would cost me a $50.00 fine *to get back into* the union, *that I was out of it,* and that understanding occurred *before* the picketing ever started. (R. 85, middle.)

"*I didn't want to join the union in the first place.* I only joined it because I didn't want to make any trouble for my employer and they had said that they would picket, which would hurt business, so I joined. *Before I signed up one of the union agents told me that eventually it would mean I would probably lose my job anyhow,* so I might just as well join up. That is the *only reason I joined.* (R. 85, bottom—86, top.)

"*I never wanted to belong to the union any of the time I was in it. I only stayed in because I was afraid the store would be picketed.* (R. 86, botton—87, top.)

"Plaintiff's Exhibit No. 2 (written form of resignation from Union) was handed me and I took it over to the counter and set it down and *the other two clerks and I talked about it and we were more than welcome to sign the paper to get out of the union.* We didn't care for it in the beginning or all the way through. *That is what we said to each other and that is the only reason we signed it.* When I signed it I regarded it as a formal notification of the fact that I was *already out* of the union. I received Exhibit No. 2 from the hand of Mr. Roth in the first place. (R. 87, top.)

"During the time that we were discussing it, *Mr. Roth had gone back* over to the meat side and *tended to his business* and I went over on the grocery side and set it down there and discussed it. Mr. Roth

was waiting on trade and *paying no attention to us.* (R. 87, middle.)

"The fact that this paper came from the hand of Mr. Roth did not have any influence on my mind one way or another. The space where Mr. Roth was standing was about forty feet distant across the store from where we were standing. There was no other person with us. We all affixed our signatures at that time. (R. 87, bottom—88, top.)

"I signed of my own free will and accord. I read it before I signed it, I *understood* its language and the language on the Exhibit *expressed my own intention and desire,* and *that is the reason* I signed it. There was *no fear or thought in my mind about Mr. Roth* discharging me if I stayed in the union. (R. 87, middle.)

"Prior to this time *Mr. Roth had told us to do as we wished,—that it was of our own free will whether we wanted to join. I remembered that statement and had it in mind at the time I signed this resignation. I understood that it was entirely up to me at all times. Mr. Roth never did anything whatever, at any time, that influenced me to get out of the union.* (R. 88, bottom—89, top.)

"I had been at peace with my employer, getting along satisfactory, and at the time of the picketing I was getting $17.00 a week, which was *higher than the union* wage scale. I was working around forty-eight hours a week, *which was less* than the union scale." (R. 89, middle.)

Note: Foregoing is from direct examination. No substantial change was made in cross and re-direct examination (R. 90-92), so latter are omitted to avoid prolixity.

Wellington Barnes (R. 58-84):

"I am now in the employ of Aaron Roth and was in his employ on the 17th day of May, 1939, when this picketing occurred. The store is owned by Mr. Roth and at the time that the picketing occurred Mr.

Roth had three employees consisting of myself, Meyer Kaplan and Dorothy Carlson. Prior to the 17th day of May, 1939, I joined the defendant union. Before I had joined, one of the business agents of the union came and talked to me at the store and asked us to join up with the union. I told him I want to know some of the *reasons* and what would be the benefits out of joining them and he didn't give me any satisfaction. He just told me it would be *best* to join; so I walked away from him and he followed me to the back and I walked away from him again and then he came up to me and said, '*Better join or the store will have pickets in front of it.*' *So* the next day we joined up. He also talked to the other two clerks, Meyer Kaplan and Dorothy Carlson, the same day he talked to me. At the time that I talked to the agent of the union, *I told him I didn't care to join* it and it was after I had made this statement that he stated I had better or there would be pickets out in front. (R. 58-59; R. 61, bottom—62, top.)

"On the morning that the picketing started I was in the store. I saw one of the defendants talking to Mr. Roth that morning. After he had talked to Mr. Roth I saw him go over and talk to Dorothy Carlson and also with Meyer Kaplan and then he came and talked with me. *He merely said, 'I don't suppose you will strike,' and I answered him, 'That is right.'* He then walked out of the store and then there were pickets out in front of the store. He took them out of his car from across the street. The picketing began about five or ten minutes *after* he had walked out of the store. The picketing sign read in substance: 'This store is unfair to Retail Clerks Union Local 1460.' (R. 62-63.)

"I, Meyer Kaplan and Dorothy Carlson *kept right on working* in the store and *none of us struck.* At that time *none of us had any quarrel or controversy with our employer.* The store had opened up about the previous January and I started working there very shortly after that time. Dorothy Carlson had worked there from the time it had opened as also did Meyer Kaplan. *There had never been any con-*

troversy to my knowledge between any of the clerks and Mr. Roth down to the time of the picketing and we continued to work in business with him during the time the picketing was going on. (R. 65, top.)

"My signature is attached to Plaintiff's Exhibit No. 2 (written resignation from Union) and the signature of Dorothy Carlson and Meyer Kaplan also appear thereof. This paper, Exhibit No. 2, was received by Miss Carlson from Mr. Roth and *he went back to the meat side,* over there, and she gave it to me to read over. *She* said, 'Here read this.' I read it and *was willing* to sign such a thing as that *to get out of the union, which I didn't want to belong to in the first place.* The store is about forty feet wide, the meat side is on the south side thereof and the grocery part on the north side. I saw Mr. Roth hand Dorothy Carlson this paper. *From Mr. Roth she then came over to the grocery counter on the north side of the store and Mr. Roth remained on the meat side over at the extreme south side of the store.* Meyer Kaplan was with me and we three clerks were standing around the grocery desk on the far side of the store at the same time, looking at this paper. Each of us read it separately and then we each signed it. I signed first and then Mr. Kaplan and then Miss Carlson. After it was signed, I imagined it was mailed. *Miss Carlson took care of it.* I handed it back to *her.* While we were reading this paper and signing it *Mr. Roth remained on the meat side of the store.* He *never* came over and said anything to any of us. All he ever said to us at any time about whether we should sign this paper or not was that *'It was up to us'.* This statement was made to us *before the day we signed* this paper. *Mr. Roth never at any time said anything to us as to whether or not we should sign* the paper marked Plaintiff's Exhibit No. 2, and *never spoke to us about this paper.* (R. 65, bottom—68, top.)

"*Mr. Roth never said anything to us one way or another about getting out of the union* and at the time that we signed the paper there was *no fear in my mind* about Roth discharging me if I stayed in the

union. I *didn't want to join* the union in the first place. My *only reason* for joining the union in the first place was to keep them from placing pickets in the front of the store. I don't care for the union. (R. 69, top—70, top.)

"I read Plaintiff's Exhibit No. 2 before I signed it. *I signed it of my own free will.* I understood its meaning and the language *expressed my true desires and intention.* That is the *only reason I signed it.* (R. 70, middle.)

"When I *refused to strike* and refused to quit work just before the picketing started, he (respondent, Day, union agent) told us that *in order to get back into the union* there would be a $50.00 fine and from this statement I understood that *I was already out of the union and expelled from that time on,* and I did not look upon myself as a member of the union any longer. I intended the written resignation to be a formal notification of that fact and it was my understanding that *Dorothy Carlson did send it to the union,* and so far as I know, it was sent to the union by registered mail. I considered my resignation an accomplished fact from the time of my talk with the agent that morning, before the picketing started. (R. 70, bottom—71.)

"*I never heard Mr. Roth say anything to the other clerks desiring them to get out of this union.* The fact that I saw Mr. Roth hand this paper, Plaintiff's Exhibit No. 2, to Dorothy Carlson before she brought it over to me, *did not have any influence on my mind one way or another as to whether I should sign it or not.* As we were reading it *we gave no weight to the fact of what Mr. Roth might want us to do.* In fact, Mr. Roth was not discussed between us while making up our minds on the subject. The other two clerks did not express any fear as to what might happen to them or their jobs if they stayed in the union. (R. 72, bottom—73, top.)

"*It had been my continuous desire to get out of the union from the time that I had joined.* After I joined the union, a woman union representative came around

to collect dues. I delayed making my payments because we didn't want to give them our money. My attitude was hostile to the union *before* picketing commenced. I would delay making payments each month when they came around to collect the dues. (R. 73, middle—74, top.)

"At the time the picketing started, my weekly wage was $30.00. The top union scale was $20.00 per week after three or four years of membership. I got that figure from the union agents themselves. The working conditions in the store were sanitary and satisfactory to us employees. I never had any trouble with my employer. I never attended a union meeting or asked the union to intercede for me on any matter. I had signed up with the union agent at the store solely because of his threat to picket. Dues were collected at the store. This was the only contact I ever had with the union. (R. 74, middle—75, top.)

"The wages, hours and working conditions in Mr. Roth's store at the time this picketing began *were superior to those of the general standard in that community.* (R. 75, middle.)

"After the picketing *I did not want to belong to the union again. I do not want to belong to it now and would not join it,* and do not want to have anything to do with the defendants. *This desire arises out of my own free will and no word or act of Mr. Roth, at any time, influenced that desire in my mind.* (R. 75, bottom—76, top.)

"None of the pickets in front of the store *ever were employed* in the store and I had never seen them before. They were strangers to me. None of the defendants *ever sought employment* in the store for themselves or anyone represented by them. (R. 76, top—82, middle.)

"The reason I did not notify defendants by formal resignation between the time I joined and the time they started to picket was because of their agent's statement to me that they would picket if I did not belong." (R. 83, middle.)

Respondent Day (agent of respondent Local Union), whose dealings with the employees is above related by them, *did not testify,* and their testimony is uncontradicted. Respondent Housewright (agent of respondent International Association) testified, and did not deny any of the above facts testified by the employees, but corroborated them by the following testimony:

Vernon Housewright (R. 103-113):

"I was an officer of the International and Mr. Day was an officer of the Local, and during the time in question he was an organizer of the Local and *all that both of us did* in connection with picketing with Roth's store *was done on behalf of our respective unions.* That was our jobs. I do not know how long Mr. Day had been in Hammond previous to my arrival in May, 1939. *I do not undertake to state what conversation Mr. Day may of had with these employees before my arrival.* Mr. Day was with me in the store on May 17, 1939. I did the talking on this morning. Mr. Day may have said something. I don't remember what he said. *The clerks told me they would not strike.* The picket line was established about ten or fifteen minutes later. I had the picket and the sign prepared before I went into the store that morning. (R. 111, bottom—112, bottom.

"I gave Mr. Roth a final opportunity to *sign* and when he refused, I established a picket line. *If Mr. Roth had signed, I would not have established the line.* It was my intention to run the picket line *until* Mr. Roth decided to *sign* the contract *and if he would sign the contract I gladly would have withdrawn the picket.*" (R. 113, top.)

Stipulation:

The parties stipulated the contents of the contract which is above referred to in respondent Housewright's testimony, as follows:

"It is stipulated that the contract which the union presented to Aaron Roth * * * contained the provision that while Mr. Roth could employ clerks who were not members of the defendant union, they *must*, within thirty days after the date of such employment, agree to *become* members of the union, *and upon failure so to do they would be discharged.* The contract further provided for wages, hours of employment and certain working conditions in conformity with the rules and regulations, constitution and by-laws of the defendant union. The 30-day provision would apply to *any clerks in Mr. Roth's employ, who were not then members in good standing* of the defendant union." (R. 96.)

Finding by Trial Court (R. 47-50):

Upon the above uncontradicted testimony of the employees, and admissions of respondents, the trial court made the following findings of fact:

"2. There was no strike in this store. Plaintiff was at peace with all his employees. None of them wanted to belong to this union. The picket was not an employee of the store but was a paid agent of the union. *The object* of the picketing was to compel the store owner, against his desire, to sign a closed shop contract with the union whereby the *employees* would be *compelled* to join the union, against their will, or be discharged. The Union is Local No. 1460 of Retail Clerks Union. (R. 48, middle.)

"3. Said union *formerly induced* said three employees to join the union by *coercion*, to-wit: Threatening them that if they did not join, the store would be picketed and that they would lose their jobs, and solely because of said threat the employees joined the union a few weeks prior to the picketing; but said employees resigned therefrom at the first opportunity, to-wit: On May 17, 1939, just *before* the starting of the picketing, the defendants requested said employees to go on strike and threatened them with a fine if they did not, and said employees *then*

refused to go on strike and afterwards on the afternoon of the same day signed a written resignation from the union which was delivered to the union the next day, notwithstanding which the union continued to picket by its said agents as aforesaid. (R. 48, bottom.)

"4. All of said three employees, Dorothy Carlson, W. A. Barnes, and Meyer Kaplan, resigned from said union *solely of their own free will* and accord, and solely because of their own personal desire so to do. *They were not in any way, or to any extent, coerced, interfered with, intermeddled with, aided or encouraged by plaintiff*, or by anyone on his behalf, with regard to said resignation, or with regard to any of their other relations with any of the defendants. The resignation handed to them by plaintiff with the request to read it was *not a motivating factor* in their signing said resignation. *Before* receiving said form from plaintiff said three employees had previously, on the morning of that day, refused the command of defendants to strike, and *they had intended* and did intend by this refusal to *repudiate* their membership in said union, and to repudiate all rights of the defendants to represent them, which intent had existed prior to the time the picketing started and *prior* to their being handed said form by plaintiff. Likewise, at the time of said repudiation and prior to the picketing, defendants had informed said employees that they were no longer members and that it would cost them a fifty-dollar fine to get back in. Plaintiff by refusing to sign said contract did not intend to be unfair to defendants or to organized labor, and *had not done anything detrimental* to the interests of defendants or organized labor. * * *" (R. 49, top.)

The Indiana Supreme Court's opinion does not overrule, modify or refute the above findings, but simply ignores them and ignores the uncontradicted evidence and admissions supporting them.

Issues:

Besides basing its opinion on fictitious facts, the Indiana Supreme Court based its opinion on a fictitious *issue*. Respondents never *pleaded* any charge of coercion or causing resignations, against petitioner, in their answer. (R. 7.)

Basing its judgment on a fictitious issue deprives petitioner of equal protection and due process of Indiana law. The law is settled in Indiana that all such affirmative defenses must be specially pleaded and that no Indiana court can render a judgment on an issue not pleaded.

Boardman v. *Griffin*, 52 Ind. 101, 106.

Secs. 2-101, 2-1015, 2-1024, Burns' Ind. Statutes 1933.

Same Essential Facts in First Appeal:

The facts found by the trial court in the first trial on temporary injunction (R. 10-12) are substantially the same as found in the new (present) trial, except that in the latter the trial court added to its findings an express negation of coercion by petitioner. (R. 47-50.)

And it appears on the *face of the opinion* in the first appeal, that the *essential facts*, on which the Indiana Supreme Court pronounced the law were the same as the present evidence. The first opinion states the facts as follows:

> "In the facts found it appears that at all the times under inquiry the plaintiff owned and operated a small retail grocery, fruit, and vegetable store in the City of Hammond and that he had three employees; that the defendant Local Union No. 1460 of Retail Clerks Union *coerced* said employees into *joining* its organization, by threatening them that if they did not do so the store would be picketed and that they would

lose their jobs; that thereafter the *union requested said employees to go on strike* and threatened them with fines if they refused; that the employees *refused to strike* and resigned from the union; * * * that there was no strike in the store; that plaintiff was at peace with his employees; that none of them belonged or wanted to belong to said union; and that 'the object of the picketing (was) to compel the store owner, against his desire, to sign a closed shop contract with the union whereby the employees would be compelled to join the union, against their will, or be discharged.' "

Roth v. *Local Union, etc.*, 216 Ind. 363, 365; 24 N. E. (2d) 280.

The opinion appealed from, and its predecessor to which it refers, attempt to set up a fictitious distinction between the facts in the first appeal and the present evidence. These alleged distinctions are:

(1) That the facts in the first appeal came up in the form of special findings instead of evidence. (This makes no difference because Indiana law permits an appellant to take up facts in the form of special findings instead of evidence.

Graham v. *State, ex rel.*, 66 Ind. 386, 394 (middle), 395 (bottom).

Fort Wayne etc. Works v. *City of Fort Wayne*, 214 Ind. 454, 462 (top).

Secs. 2-2102 and 2-2502, Burns' Ind. Sts. 1933.

(2) That the findings in the first appeal made it appear to the Supreme Court that the employees were not union members at the time the picketing began and at the time the Union demanded that petitioner sign. (No such thing was shown in those findings, but on the contrary they plainly stated to the Supreme Court that "just *before* starting the picketing, the defend-

ants requested said employees to go on strike and threatened them with fine if they did not, and said employees *then* refused to go on strike and *afterwards* on the afternoon of the same day signed a *written resignation* from the union which was delivered to the union the *next day*, notwithstanding which the union *continued* to picket by its said agents as aforesaid." (R. 11, bottom.) Which is precisely the same state of facts shown by the findings on the second appeal. (R. 27, bottom.) And precisely the same state of facts is shown by the present findings on new trial. (R. 48, bottom.)

(3) That the employee, Dorothy Carlson, and her fellow employees were *coerced* to resign from the Union by the mere fact that petitioner handed her a written resignation form,—*after* they orally repudiated the Union, which form they *desired* as a means of escape. (This charge of coercion was false when first made in the second opinion. Its falsity appears on the face of the opinion from the evidence there quoted, 218 Ind. at page 278. Even if such an inference could be tortured out of the evidence quoted in the second opinion, it can't possibly be drawn from the present evidence on the new trial. Yet the present (third) opinion adopts this false charge as its own. (39 N. E. (2d) 775.)

(4) The opinion grasps at fictitious straws to construct an accusation against petition, by:

(a) Complaining of the "mysterious source" of the written resignation letter, which is a trivial and fictitious issue, because the employees as free people had a right to obtain a *desired* written form from any draftsman, and all the evidence

shows that its source was not a moving factor in their resignation and did not operate to influence or coerce them.

(b) After drawing a preposterous inference, the opinion seeks to blame petitioner for not "producing evidence to rebut any erroneous inference we may have drawn from the facts," whereas he did produce the best evidence to rebut the charge of coercion, namely: the employees themselves.

(c) The opinion attempts to charge employee, Dorothy Carlson, with changing her testimony, whereas her previous testimony which was stipulated into the record on new trial is the same. (R. 113, bottom—115.)

(d) The opinion admits that "there may be some doubt from the evidence that she or the other clerks were in fact coerced" and then goes on to state the preposterous conclusion that the employer was nevertheless guilty of coercion as charged in the preceding opinion.

Moreover, this hue and cry about this written resignation is a false and obsolete issue, because the resignation was signed on May 17, 1939, the day *before petitioner filed his suit* on May 18, 1939. (.....) So the status never changed after suit was filed. Respondents' answer does not assert the right to picket in order to *punish* petitioner for any *past offense* and does not even charge that it was an offense. Their answer filed on May 22, 1939, refers to the employees as non-members of the union and says that "plaintiff's employees have no labor organization of their own and are *wholly unorganized.*" (R. 8, top.) The only pleaded ground of petitioner's "unfairness" is that he

now refuses to *sign* the contract. (R. 8, top.) And respondents so testified and stipulated. See Housewright's testimony and stipulation, above, at page 18 of this petition.

The same answer was before the court on the last appeal as on the first, never having been amended.

And the same essential facts were before the court on the last appeal, as above shown.

Indiana Law Protects Other Citizens in Petitioner's Situation:

In its first opinion the Indiana Supreme Court construed the Indiana statute to mean as follows:

The statute here under consideration declares that it is the public policy of this state that the *individual unorganized worker shall be free to decline to associate* with his fellows and that he shall be free from interference, restraint, or coercion on the part of his employer. This must mean that *no labor union may demand that an employer require his employee to join such union*, because no employer has the right to require an employee to join or refrain from joining a labor union. *Any person* or group which undertakes to coerce an employer to do that which is contrary to the express public policy of this state thereby undertakes to compel the performance of an *unlawful act*. The lawful weapon of peaceful picketing may not be utilized to accomplish *such an unlawful purpose*. It is quite immaterial that the things done to bring about the unlawful purpose were not *per se* unlawful. *This is our interpretation of our statute.*

Roth v. *Local Union, etc.*, 216 Ind. 363, 370, 24 N. E. (2d) 280.

The above construction became a part of the statute,

and every citizen of Indiana is entitled to its protection, upon showing that his situation is substantially similar to the state of facts set forth in that opinion. This, petitioner has done in the present record. He has shown identical issues. He has shown facts identical on all essentials and even stronger on some details.

While the statute thus construed would protect any other citizen of Indiana in petitioner's situation, he has been denied protection by means of painting him in the fictitious role of a law violator coercing his employees, thereby placing him outside the pale of the law.

While claiming to be solicitous to protect the employees from imaginary coercion of petitioner, the last opinion throws them to the vengeance of their real oppressors, and compels them to beg to re-join the Union at a fine of $50.00 per head (or any other terms the Union cares to fix, perhaps total exclusion).

The Indiana law says it is unlawful for the Union to force them to rejoin,—yet the court opens the door for the Union to go on picketing to accomplish this wrong. More, it compels petitioner to join in committing the wrong, else his property will be destroyed.

The opinion tells the employer that he sinned before by handing a "mysterious" letter. Now the court compels him to break the law again to protect his property. The court denies protection but plainly indicates to him that he can purchase private relief from the Union by breaking the law.

Even if he had offended the law by the letter episode (which he did not), the Indiana court cannot arbitrarily close its doors on him, thereby inflicting a property loss of unlimited amount regardless of the triviality of the supposed offense.

The first opinion, above quoted, has never been reversed, modified in later decisions of that court. So it stands today as the construction of that statute and as a part of the statute. We briefly review all subsequent picketing decisions of the Indiana Supreme Court to show this point:

The second and third opinions in this case (218 Ind. 275, 31 N. E. (2d) 986, and 39 N. E. (2d) 775), make no attempt to modify the above quoted construction placed on the statute in the first opinion (216 Ind. 363). On the contrary, the second opinion expressly recognizes that construction (218 Ind. 275, at bottom of page 276). The second opinion merely orders a new trial on pure questions of evidence. The third opinion does not even mention the statute but goes off on alleged questions of evidence. The second and third opinions let the statutory construction stand for the benefit of other citizens but attempt to exclude petitioner from the class.

Davis v. *Yates,* 218 Ind. 364, 32 N. E. (2d) 86, decided eight days after the second opinion, does not even mention the statute or petitioner's case, and makes no attempt to change the statutory construction. It's facts are entirely different,—former employees seeking re-employment and protection against a sub-standard pay scale of the employer. No such question is in our case, because the trial court found that respondents sought no employment and made no complaint about this employer's standards, which were superior to the Union's (R. 49, middle), and the uncontradicted evidence so showed. (R. 75, middle—82, middle.)

Davis v. *Yates, supra,* 218 Ind. 364, properly holds that its facts fall within the scope of United States Supreme Court decisions on free speech. *But, very significantly,*

the Indiana Supreme Court did not attempt to use the free speech doctrine to justify its second opinion (218 Ind. 275), decided eight days prior to *Davis* v. *Yates*, and at the same term; nor did the court attempt to use the free speech doctrine to justify its third opinion (39 N. E. (2d) 275), decided a year after *Davis* v. *Yates*. The court apparently recognized that free speech could not be used as a cloak to cover unlawful and coercive conduct by such as was condemned in the first opinion (216 Ind. 363), so the court let the law of the first opinion stand and put petitioner beyond its pale by fictitious accusations. The court was doubtless aware of this Court's ruling that:

> "We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing *a coercive effect* whereby it would operate destructively as force and intimidation."
>
> *Milkwagon Drivers Union, etc.* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836.

Indiana undoubtedly had the power to make the law which is established in the first opinion in this case (216 Ind. 363), in view of the following recent decisions of this court:

> *Carpenter's etc. Union* v. *Ritter's Cafe* (March 30, 1942), 62 S. Ct. 807, 809, 316 U. S. ...., 86 L. Ed. .....
>
> *Hotel & Restaurant Employees etc.* v. *Wisconsin Employment Relations Board* (March 2, 1942,) 62 S. Ct. 706, 708, 315 U. S. ...., 86 L. Ed. ...

But the primary question here presented is not the state's power to establish this law, but the denial of equal protection of the law while the law is apparently valid and is operating for the benefit of other citizens.

Additional Discrimination:

Besides the rule of law laid down in the first appeal of this case, already discussed (216 Ind. 363), the Indiana Supreme Court has established another rule of law, to-wit:

> "It is established by the authorities beyond controversy that picketing which involves *false statements or misrepresentation of facts* concerning the controversy *is unlawful and will be enjoined.*"
>
> *Weist* v. *Dirks,* 215 Ind. 568, 572, 20 N. E. (2d) 969.

The following findings by the trial court were sufficient in themselves to entitle petitioner to relief under the last quoted rule of law:

> "* * * after plaintiff had refused to sign the contract hereinafter referred to, defendants commenced to picket plaintiff's store by causing one of their agents to walk continually to and fro on the sidewalk in front of said store, wearing a sign reading in substance as follows: 'This store is *unfair* to Retail Clerk's Union Local No. 1460, affiliated with American Federation of Labor.' Said signs and picketing conveyed to the public and to plaintiff's customers the idea that plaintiff refused employment to or discriminated against members of defendant union, which idea implied representations which were false. (R. 47, bottom.)
>
> "* * * Plaintiff by refusing to sign said contract did not intend to be unfair to defendants or to organized labor, and had not done anything detrimental to the interests of organized labor or to defendants. At the time of said picketing, and continually down to the present time, the wages, hours and working conditions in plaintiff's store were *equal to or better than those promulgated by defendants,* and to the standard prevailing in the City of Hammond, Indiana, in that line of work. *None of defendants had at any time made any complaint or request upon plaintiff*

with respect thereto, except that set forth in finding No. 2 (to sign the contract). Neither did defendants at the time of the picketing or at any time since *desire or request employment by plaintiff for themselves or anyone represented by them.* None of the defendants or anyone represented by them was ever employed in said store." (R. 49, middle.)

The above findings are supported by all the evidence, including the admission of respondent Housewright that the only reason for the picketing branding petitioner "Unfair" to the Union was his refusal to sign an agreement to do an act which would be unlawful under Indiana law (namely force his employees to re-join the Union).

See: Housewright's testimony, R. 113, top; Barnes' testimony, R. 74, 75, 82; Stipulation, R. 96.

The above quoted rule of law laid down in *Weist* v. *Dirks,* 215 Ind. 568, 572, is still in full force in Indiana never having been overruled, modified, or even mentioned in any subsequent decision.

Yet the Indiana Supreme Court failed to give petitioner the protection of this rule of law which protects other citizens. The Court ignored this law, apparently for the same reason that it expressly refused him protection of the statute, namely, that he was a sinner and hence an "untouchable" to the court.

Wherefore, petitioner respectfully prays this Honorable Court to bring up this cause by its writ of certiorari to the Supreme Court of Indiana, and for all further just and proper relief in the premises.

JAY E. DARLINGTON,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 181

AARON ROTH, *Petitioner*

vs.

LOCAL No. 1460 OF RETAIL CLERKS UNION, RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, THOMAS DAY AND VERNON HOUSEWRIGHT,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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I.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

STATEMENT OF MATTER INVOLVED.

This case involves a labor dispute within the terms of Chapter 12 of the Acts of 1933 of the Indiana General Assembly being Sections 40-501 to 40-514 inclusive, Burns Indiana Statutes, Annotated 1933, (Appendix A) which act is the prototype of the Federal Norris-LaGuardia Act passed in 1932. Respondent Union is an established labor Union, whose members are clerks employed in Retail Stores (R. 105 top).

Petitioner is a member of a grocers' association and owns and operates a retail grocery store and employs clerks eligible for membership in respondent union (R. 78 bottom). That at and for some time prior to the time of the patrolling complained of, petitioner's clerks were members in good standing, with all dues paid, in respondent union (R. 105, R. 77, and R. 91). That petitioner, on request of the grocers' association of which he was a member, refused to enter into a contract with respondent Union, which contract provided for hours of employment and wages and the further provision that the petitioner should agree that all future clerks employed by him should, if not members of respondent Union at time of employment, become and remain members of respondent Union as a condition of employment (R. 96). On May 17, 1939, the respondent Union requested the petitioner to sign the agreement which had been presented to him for signature, which he refused to do stating that he had given his word to the grocers' association that he would not do so (R. 104). Thereupon petitioners' clerks were asked to strike which they refused to do. A patrol was established which consisted of one person walking unaccompanied along the outer edge of the sidewalk in front of petitioner's retail store carrying a banner with the inscription thereon "THIS STORE IS UNFAIR TO RETAIL CLERKS UNION, LOCAL NO. 1460, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR" (R. 100). That the picketing was free from fraud, violence or any unlawful conduct (R. 100). On the afternoon of May 17, 1939, and after the picketing began petitioner without any request from, or knowledge of, either of his clerks caused to be prepared a written resignation of all of his clerks from respondent Union (Exhibit 2, R. 93), accompanied with the request that his clerks read the same and do as they

saw fit. That the first knowledge which petitioner's clerks or either of them had of the preparation of such resignation was when petitioner handed the same to one of his clerks to read (R. 79, R. 90-91). That immediately upon receiving said Exhibit 2, the clerks did read and sign the written resignation in petitioner's store (R. 87 and 88). After the same was signed it was mailed to the respondent Union and received by it the day after the picketing began.

After the typewritten resignation was mailed to the respondent Union, the petitioner filed this action in the Lake Circuit Court against respondents for an injunction seeking to enjoin respondents from in any manner picketing or causing to be picketed petitioner's said retail store. Petioner contended that none of his employees were members of respondent Union, that he was at peace with them, that the object of the picketing was to induce petitioner to sign a closed shop contract with respondent Union and that such object was unlawful and that picketing for such purpose, even though peaceful and free from violence, was fraudulent.

The respondents contend that peaceful picketing or peaceful persuasion in relation to any dispute between petitioner, an employer, and respondent, a trade union, may be indulged in under the constitutional guarantee of freedom of speech even though his employees are in no controversy with him. Further, that all of petitioner's clerks were members of respondent Union at the time that the patrolling began. That the demand of the respondent Union, that all future clerks employed by petitioner should, as a condition of employment, become and remain members of respondent Union was a legal objective. Further, that the acts of petitioner in interfering and aiding and encouraging his employees to sever their connection with the respondent Union during the time the picketing was

being carried on precludes the petitioner under the statute from seeking or obtaining injunctive relief.

The trial court on the first hearing issued a conditional temporary injunction (R. 13) from which petitioner appealed to the Indiana Supreme Court which reversed the trial court, *Roth* v. *Local Union, etc.*, Dec. 22, 1939, 216 Ind. 363, 24 N. E. (2d) 28, (R. 18). The evidence was not brought up on the first appeal for review. (R. 41) Appendix B.

Upon retrial the trial court granted a permanent injunction (R. 29) enjoining respondents from in any manner picketing petitioner's store. Respondents appealed to the Supreme Court of Indiana, *Local Union, etc.* v. *Roth*, Feb. 24, 1941, 218 Ind. 275, 31 N. E. (2d) 986, Record 41, Appendix C, which court reversed the trial court with this language:

> "On the trial of the application for a temporary injunction, the court found the facts specially. Upon the appeal the evidence was not brought before us, and the cause was decided upon the basis of the facts disclosed by the special findings. From the facts shown, it was concluded by this court that the three clerks who worked for Roth in his store were not members of the picketing union at the time the picketing began and at the time demands were made upon him to sign a closed-shop agreement; that he had not interfered with the freedom of his employees to join or not to join the union; that he was refusing to interfere or to sign a contract, by the terms of which he agreed to require his clerks to join the union upon the ground that to do so would require him to violate the expressed statutory public policy of the State (Acts 1933, Chapter 12, Section 2, page 28, Burns Indiana Statutes, 1933 Section 40-502, Baldwin's Ind. St. 1934, 10156) (R. 41-42).
>
> "* * * Upon the present appeal the evidence is brought into the record * * * (R. 42)."

The court then sets out the testimony of the clerks employed by the petitioner showing the preparation and manner and way in which the resignation was prepared and signed. (R. 42, 43 and 44). The court continues:

> "It is clear from this undisputed evidence that at the time the union demanded that Roth sign a closed shop contract, and at the time the picketing began, all of Roth's clerks were members of the picketing union, and continued to be members for at least several hours thereafter; that Dorothy Carlson, and, it may be inferred, the other two clerks, never saw the letter of resignation until it was handed to them by Roth; that she at least, and probably the other two, had not planned to resign until presented with the document * * * (R. 45). It clearly indicates that Roth's employees were not 'free from interference,' as the public policy statute upon which he relies requires that they should be." (R. 45) * * *
>
> "These facts established a case differing substantially and materially from the one disclosed by the special findings. From the special findings it appears to be a case in which a labor union seeks, by picketing, to coerce an employer to require his employees who are not members of the union to join the union upon penalty of being discharged. But it is not such a case. At the time the picketing began its purpose was to coerce an employer, all of whose employees were members of the picketing union, to agree that in the future he would employ only union members. The right to an injunction under such circumstances was denied in *Scofes et al* v. *Helmar et al* (1933), 205 Ind. 596, 187 N. E. 662. (R. 45) * * * The employer had interfered and aided and encouraged his employees to sever their connection with the union. The conduct is a violation of the very public policy statute which the appellee relies upon as entitling him to an injunction. * * * Under the public policy declared by that statute, he has been unfair, and the banner carried by the picket speaks the truth." (R. 45 and 46.)

Upon retrial, the trial court again granted a permanent injunction enjoining respondents from in any manner picketing petitioner's store. (R. 53.) The respondents appealed to the Supreme Court of the State of Indiana (*Local No. 1460 etc.* v. *Roth,* March 5, 1942, ——— Ind. ———, 39 N. E. (2d) 775, (R. 117), Appendix D. The Supreme Court of Indiana again reversed the lower court with the following language:

> "In the former opinion we commented upon the fact that none of the clerks knew about the letter until it was handed them ready for their signatures and that its source was a mystery. In the retrial appellee had the opportunity of producing evidence to rebut any erroneous inference we may have drawn from the facts and from his unexplained connection with the letter. But he did not choose to testify. Nor was his conduct in anywise explained. There is no change in the evidence as to what he did. (R. 118-119) * * * there is no escape from the conclusion that their employer interfered and aided and encouraged his employees to sever a connection with the union which he thought existed, and this at the time of the picketing which he sought to enjoin. We think the facts are substantially the same as related in the second opinion which therefore is the law of the case." (R. 119.)

The first question presented by the record and the petition and brief of the petitioner is: Will the Supreme Court of the United States issue a writ of certiorari to a State Supreme Court on a decision of that court which is based upon facts supported by the record?

Respondents respectfully submit that the findings, decision and opinion of the Indiana Supreme Court in the instant case is supported and sustained by all the evidence in the record and that no title, right, privilege or immunity are specially set up or claimed by the petitioner under the constitution which has not heretofore been passed upon and uniformly denied by this court.

JURISDICTION

Jurisdiction not shown.

This court has frequently announced the rule that the decision of a state court upon a question of fact will not be made the subject of inquiry and review except:

1. Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and,

2. Where a conclusion of law as to a Federal right and finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

> *United Gas Public Service Company* v. *State of Texas* (1938) 303 U. S. 123, 58 S. Ct. 483.
>
> *Aetna Life Insurance Company* v. *Dunken* (1924) 266 U. S. 389, 394; 45 S. Ct. 129.
>
> *Truax* v. *Corrigan* (1921) 257 U. S. 312, 324, 325.

The petitioner in his petition and brief when read in conjunction with the record has raised no issue bringing him within either of the above exceptions:

1. (a) No federal right has been denied the petitioner. His claim being that he is deprived of his rights under the Fourteenth Amendment to the (1) Constitution of the United States by reason of the fact that none of his employees were members of the Union at the time the picketing began and (2) that the purpose of the picketing was to require petitioner to unionize his store. This court has answered this question adversely to petitioner's contention in the case of *American Federation of Labor et al* v. *Swing et*

al (Feb. 10, 1941) 312 U. S. 321, 61 S. Ct. 570, with the following language:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

Thornhill v. *Alabama* (1940) 310 U. S. 88-105; 60 S. Ct. 736, 746.

Senn v. *Tile Layers Protective Unions, Local No. 3,* (1937) 301 U. S. 468, 478; 57 S. Ct. 857, 862.

New Negro Alliance v. *Sanitary Grocery,* (1938) 303 U. S. 552, 58 S. Ct. 703.

Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.* (1941) 61 S. Ct. 552; 312 U. S. 287.

Bakery Pastry Drivers and Helpers Local 802, etc. v. *Wohl et al* (1942) ———U. S.———; 62 S. Ct. 816.

Carlson v. *People of State of California* (1940) 310 U. S. 106.

(b) The finding of the Indiana Supreme Court that petitioner's employees were members of the respondent Union at the time that the picketing began and that the petitioner had interfered and aided and encouraged his employes to sever a connection with the Union, which he

thought existed at the time of the picketing which he sought to enjoin, is sustained and supported by the record.

Evidence: Wellington Barnes (R. 79-80).
Evidence: Dorothy Carlson (R. 87 and 90).

(c) In view of the decisions of the Supreme Court of the United States, the decision and judgment of the Indiana Supreme Court complained of by the petitioner does not deprive him of the equal protection of the laws of the State of Indiana and does not deprive him of any right, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States or the Constitution of the State of Indiana nor the laws of the State of Indiana as embodied in Section 40-501 to 40-514, Burns Indiana Statute 1933, Appendix A.

2. The petition, brief and record discloses no conclusion of law as to a federal right intermingled with the finding of facts.

THE QUESTIONS PRESENTED.

Respondent, a union of those engaged as retail clerks, unsuccessfully tried to unionize petitioner's retail grocery store. Peaceful picketing of the store followed. After a patrol was established, petitioner, without the knowledge, consent or request of his clerks, caused a typewritten letter of resignation from the union to be prepared, which he handed to them, while they were at work in his store. The clerks signed the same immediately after its receipt by them. To enjoin interference with his business and with the freedom of his workers not to rejoin the union and to prevent respondent Union from demanding a union contract, petitioner began the present suit.

The sole questions presented are:

1. Is the demand of respondent Union to require petitioner to unionize his store unlawful, in view of the public policy clause of Chapter 12 of the Acts of 1933 Burns Indiana Statutes Annotated, 1933?

2. Can the State of Indiana exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between petioner (an employer) and the respondent (a union) so small as to contain only an employer and those directly employed by him?

3. Is petitioner entitled to injunctive relief, under the Act, when he is guilty of interfering, aiding and encouraging his employees to sever their connections with the respondent Union?

REASONS WHY THE WRIT SHOULD BE DENIED.

Each of the questions presented for review in this case have been passed upon by this court and decided adversely to petitioner's contention.

1. Practically every case presented to this court for review involving a labor dispute contained a demand for the unionization of the employer's plant or place of business, and this court has uniformly upheld such demand as lawful.

In the case of *Senn* v. *Tile Layers Protective Union,* (1937) *Local 105,* 301 U. S. 468, 57 S. Ct. 857, this court said:

> On page 474: "The union endeavored to induce Senn to become a union contractor * * * Senn refused to sign the agreement and unionize his shop."
>
> On page 478: "The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution." On page 480: "The end sought by the union is not unconstitutional * * *." On page 481: "The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action * * * There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisement * * *." On page 483: "One has no constitutional right to a remedy against the lawful conduct of another."

This court expressly upheld, and declared as lawful, the demand of a union that an employer unionize his store, in the case of *American Federation of Labor et al* v. *Swing et al,* 312 U. S. 321; 61 S. Ct. 568. The following cases are in point:

Bakery and Pastry Drivers etc. v. *Wohl* (1942) ——— U. S. ———, 62 S. Ct. 816, 820.

Thornhill v. *Alabama* (1940) 310 U. S. 88-105, 60 S. Ct. 736, 746.

New Negro Alliance v. *Sanitary Grocery* (1938) 303 U. S. 552, 58 S. Ct. 703.

The seventy-fourth Congress of the United States, Senate Bill No. 1958, has expressly legalized contracts between an employer and the Union, requiring as a condition of employment membership in the Union if such labor organization is the representative of a majority of the employer's employees, said act being known as the National Labor Relations Act, Section A, Subsection 3, reading as follows:

> * * * "Provided, that nothing in this act, or in the National Industrial Recovery Act, (U. S. C. Sup. 7, Title 15, Section 201-712), as amended from time to time or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization not established, maintained or existed by any action defined in this act as an unfair labor practice to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9, (a) in the appropriate collective bargaining unit covered by such agreement when made." (Act of July 5, 1935, Ch. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 151 et seq.)

The Public Policy Clause of Chapter 12 of the Acts of 1933, Burns Indiana Statutes Annotated (See App. Index A) does not prohibit nor declare as unlawful such a demand.

2. This court has uniformly upheld the right of workingmen to peacefully exercise the right of free communication by means of patrolling and advertising by means of

banners the facts involved in a labor dispute when the same is conducted free from violence, fraud or unlawful conduct, even though the relationship of employer and employee does not exist.

Speaking of the above right in labor disputes, in the case of *American Federation of Labor et al* v. *Swing et al,* Supra, this court said:

> On page 323: "A union of those engaged in what the record described as beauty work, unsuccessfully tried to unionize Swing's Beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit * * *." On page 325: "All that we have before us, then, is an instance of peaceful persuasion disentangled from violence and free from picketing en masse or otherwise conducted so as to occasion imminent and aggravated danger. *Thornhill* v. *Alabama,* 310 U. S. 88, 105; 60 S. Ct. 736, 746; 84 L. Ed. 1093. We are asked to sustain a decree which, for purposes of this case, asserts as the common law of a State that there can be no peaceful picketing or peaceful persuasion in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> "Such a ban of free communication is inconsistent with the guarantee of freedom of speech * * * The scope of the Fourteenth Amendment is not confined by the notion of a particular State regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the State. A State cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him * * * The right of free communication can-

not therefore be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ."

Other cases passed upon by this court in which the same question was decided in the same manner, are:

Bakery and Pastry Drivers, etc. v. *Wohl* (Supra).

Thornhill v. *Alabama* (1940) 310 U. S. 88, 105, 60 S. Ct. 736, 746.

Carlson v. *People of State of California* (1940) 310 U. S. 106; 60 S. Ct. 746, 748.

New Negro Alliance v. *Sanitary Grocery Co.* (1938) 303 U. S. 552; 58 S. Ct. 703.

American Steel Foundries v. *Tri-City Central Trade Council* (1937) 257 U. S. 184, 209; 42 S. Ct. 72, 78.

Senn v. *Tile Layers Protective Union* (1937), 301 U. S. 468, 478; 57 S. Ct. 857, 862.

Lauf v. *E. G. Shinner & Co.*, (1938) 303 U. S. 323; 58 S. Ct. 578.

The Supreme Court of Indiana decided this same question in the same manner in the cases of *Scofes et al* v. *Helmar et al* (1933) 205 Ind. 596; 187 N. E. 662. *Local Union No. 26, etc.*, v. *City of Kokomo* (1937) 211 Ind. 72; 5 N. E. (2d) 628.

CONCLUSION.

The petitioner has no constitutional right to a remedy against the lawful conduct of the respondents.

Senn v. *Tile Layers Protective Union, Local No. 3* (1937) (Supra).

American Federation of Labor et al v. *Swing et al* (1941) (Supra).

Thornhill v. *Alabama* (Supra) and others.

The opinion and judgment of the Indiana Supreme Court, *Local Union, etc.* v. *Roth,* ——— Ind. ———, 39 N. E. (2d) 775, (Appendix D) violates no constitutional rights of the petitioner.

No federal questions, not heretofore decided adversely to petitioner's claims, are presented; there is no conflict in the decisions.

The petition should be denied.

Respectfully submitted,

WILLIAM H. FAUST,

MRS. IRENE FAUST,

WILLIAM H. FAUST, JR.,

Attorneys for Respondents.

APPENDIX A

Chapter 12, Acts 1933, Section 40-501 to 40-514 Burns Indiana Statutes 1933

40-501. Issuance of injunctions restricted.—No court of the state of Indiana, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

40-502. In the interpretation of this act and in determining the jurisdiction and authority of the courts of the state, as such jurisdiction and authority are herein defined and limited, the public policy of the state is hereby declared as follows:

Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definition of, and limitations upon, the jurisdiction and authority of the courts of the state of Indiana are hereby enacted.

40-503. Agreements and undertakings not enforceable. Any undertaking or promise, such as is described in this

section, or any other undertaking or promise in conflict with the public policy declared in section two (40-502) of this act, is hereby declared to be contrary to the public policy of the state of Indiana, shall not be enforceable in any court of the state of Indiana and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following: Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

40-504. Injunctions and restraining orders—When not issued. No court of the state of Indiana shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section three (40-503) of this act;

(c) Paying or giving to, or withholding from any person participating or interested in such labor dispute, or any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the state of Indiana;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section three (40-503) of this act.

40-505. Combination or conspiracy—When injunction not issued for. No court of the state of Indiana shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitutes or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section four (40-504) of this act.

40-506. Acts of officers and agents of associations—Liability for.—No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the state of Indiana for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

40-507. Injunctions—Testimony and basis for issuing—Temporary restraining order—Bond.—No court of the

state of Indiana shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect;

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; and

(d) That complainant has no adequate remedy at law;

(e) That the public officer charged with the duty to protect complainant's property are (is) unable or unwilling to furnish adequate protection. Such hearings shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officers of the county and city within which the unlawful acts have been threatened or committed charged with duty to protect complainant's property; Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restrain-

ing order shall be effective for no longer than five (5) days and shall become void at the expiration of said five (5) days. No temporary restraining order or temporary injunction shall be issued except on conditions that complainant shall first file an under-taking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable cost (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceedings and subsequently denied by the court. The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which the decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

40-508. Injunctive relief—When denied.—No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

40-509. Injunction—Finding of facts—Limitation on prohibition.—No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall

include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

40-510. Review by Appellate Court.—Whenever any court of the state of Indiana shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for cost, forthwith certify as in ordinary cases the record of the case to the Appellate Court for its review. Upon the filing of such records in the Appellate Court, the appeal shall be heard and the temporary injunction order affirmed, modified, or set aside with the greatest possible expedition giving the proceedings precedence over all other matters except older matters of the same character.

40-511. Contempts of court.—In all cases arising under this act in which a person shall be charged with contempt in a court of the state of Indiana (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and county wherein the contempt shall have been committed; Provided, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

40-512. Contempt proceedings—Change of judge.—The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided

by law. The demand shall be filed prior to the hearing in the contempt proceeding.

40-513. Definitions of terms.—When used in this act, and for the purpose of this act:

(a) A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one (1) or more employers or association of employers and one (1) or more employees or association of employees; (2) between one (1) or more employers or association of employers and one (1) or more employer or association of employers; or (3) between one (1) or more employees or association of employees and one (1) or more employees or association of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the state of Indiana" means any court of the state of Indiana whose jurisdiction has been or

may be conferred or defined or limited by act of the general assembly of the state of Indiana.

40-514. Provisions severable.—If any provision of this act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the act and the application of such provisions to other persons or circumstances shall not be effected (affected) thereby.

APPENDIX B

First Opinion re: *Roth* v. *Local Union, etc.,* decided Dec. 22, 1939), 216 Ind. 363; 24 N. E. (2d) 280.

Omitting Caption

This is an appeal from an interlocutory order granting a temporary injunction on the application of appellant, who was plaintiff below. The court found the facts specially and stated conclusions of law. There was no motion for a new trial.

In the facts found it appears that at all the times under inquiry the plaintiff owned and operated a small retail grocery, fruit, and vegetable store in the city of Hammond and that he had three employees; that the defendant Local Union No. 1460 of Retail Clerks Union coerced said employees into joining its organization, by threatening them that if they did not do so the store would be picketed and that they would lose their jobs; that thereafter the union requested said employees to go on strike and threatened them with fines if they refused; that the employees refused to strike and resigned from the union; that thereupon the union began to picket the plaintiff's store, by causing one of its agents to continuously walk to and fro on the sidewalk in front of said store, wearing a sign which read:

> "This store is unfair to Retail Clerks Union Local No. 1460, affiliated with American Federation of Labor;"

that there was no strike in the store; that plaintiff was at peace with his employees; that none of them belonged or wanted to belong to said union; and that "the object of the picketing (was) to compel the store owner, against his desire, to sign a closed shop contract with the union whereby the employees would be compelled to join the union, against their will, or be discharged."

The finding recited that the sign carried by said pickets was of the type commonly used by striking employees and

was designed to convey to the public and to the plaintiff's customers the idea that the plaintiff refused employment to, and discriminated against members of said union, which implication was false and operated as a fraud upon the plaintiff, his employees, and the public; that the plaintiff had been harassed and annoyed by said picketing and that a disturbing and notorious situation had been created in front of his store, which interfered with and diminished his business; and that irreparable injury had been inflicted upon the plaintiff which was incapable of accurate computation, and for which there was no adequate remedy at law, all of which would continue indefinitely unless restrained by the court. The court further found that the plaintiff had performed all obligations imposed upon him by law; that the public officers charged with the duty of protecting plaintiff's property were unable or unwilling to furnish adequate protection; and that the picketing of plaintiff's store had been peaceful and free from violence of any kind.

Upon the above facts, the court stated the following conclusions of law: (1) that the case involved a labor dispute within the terms of Ch. 12, Acts of 1933, commonly known as the Anti-Injunction Act; (2) that the court had jurisdiction to issue and should issue a temporary injunction enjoining the acts complained of, subject to the provisions contained in the third conclusion; and (3) that the court should on its own motion authorize defendants to do a modified type of picketing, and that failing so to do they should be enjoined.

The temporary injunction followed the conclusions of law and enjoined the defendants from coercing or attempting to coerce plaintiff to sign a closed shop contract; from coercing or attempting to coerce plaintiff to compel his employees to become members in the defendant union; and from coercing or attempting to coerce plaintiff's employees to become members of said union. They were also enjoined from in any manner intimidating or warning customers or persons doing business with plaintiff to stay away from his store. The defendants were authorized, however, to picket the plaintiff's store by causing one agent at a time to walk

in front of said store and carry a sign with letters 1½ inches high, clearly legible, bearing the following text:

> "The object of this picketing is to compel the store owner to sign a closed shop contract with Retail Clerk's Union Local No. 1460, A. F. of L.
>
> "His clerks are not on strike, do not wish to join the union and are satisfied with wages, hours and working conditions."

Except as above authorized, all picketing was enjoined, and, upon failure of the union to exercise the privilege granted within 15 days from the date of the order, the temporary injunction was made unconditional.

By proper assignments of error and cross-errors, the correctness of each of the trial court's conclusions of law and that part of the temporary injunction undertaking to prescribe a form of permissible picketing is challenged.

Prior to the enactment of any statute upon the subject in this state, this court recognized, under the principles of the common law, the right to picket in controversies between an employer and his employees, where there was no resort to force, threats, intimidation, or other unlawful means. *Karges Furniture Co.* v. *Amalgamated, etc. Union* (1905), 165 Ind. 421, 75 N. E. 877, 2 L.R.A. (N.S.) 788, 6 Ann. Cas. 829. This right, when lawfully used, has been declared to be a proper exercise of free speech and peaceable assemblage and the right to use the public streets and highways. It has also been held that when such picketing is accompanied by force, intimidation, or coercion it becomes unlawful and will be enjoined by the court in the exercise of its equitable powers. *Thomas* v. *Indianapolis* (1924), 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194. Picketing becomes unlawful when either the object thereof or the means used is unlawful. Thus picketing for an unlawful purpose will taint and render unlawful acts done in furtherance thereof which would have been lawful if done for a legitimate purpose; and, conversely, a lawful objective will not justify the employment of means which are themselves unlawful. *Local 26, Natl. Bro. of Op. Potters* v. *City of Kokomo* (1937),

211 Ind. 72, 83, 5 N.E. (2d) 624; *McKay* v. *Retail Automobile Salesman's Local Union No. 1067* (1939), ——— Cal. App. ———, 89 P. (2d) 426, 90 P. (2d) 113.

In 1933 the General Assembly passed what is commonly known as our Anti-Injunction Act. Acts 1933, Ch. 12, §§ 40-501 to 40-514 Burns' 1933. The broad purposes of the act, as gathered from its terms, appear to be to declare the public policy of this state with respect to controversies between employers and their employees and to place limitations upon the jurisdiction of courts to grant injunctions in such cases. Appellant has questioned the validity of the sections of the act relating to the last-mentioned objective, upon the theory that they are unconstitutional encroachments by the legislative branch of the government upon the powers of the judiciary. We think the present controversy may be determined without resort to a consideration of that subject. Courts will not pass upon a constitutional question or decide whether a statute is invalid, unless such decision is absolutely necessary to a disposition of the cause on its merits. *State* v. *Darlington* (1899), 153 Ind. 1, 53 N. E. 925; *Hewitt* v. *State* (1908), 171 Ind. 283, 86 N. E. 63.

We can not, however, ignore the declarations of public policy contained in the above-mentioned act. These are directly expressed in specific terms. They are as follows:

> "In the interpretation of this act and in determining the jurisdiction and authority of the courts of the state, * * * the public policy is hereby declared as follows:
>
> "* * * the individual unorganized worker * * * should be free to decline to associate with his fellows, * * * have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and * * * *that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* * * *." (Our italics.) Acts 1933, Ch. 12, §2, §40-502 Burns' 1933.

To ascertain the intent of the legislative body that enacted a statute is the fundamental rule for its judicial construction. When the purpose of an act is expressed in clear and unambiguous terms, this must be accepted as the solemn declaration of the sovereign. The public policy of the state is a matter for the determination of the Legislature and not for the courts. The statute here under consideration declares that it is the public policy of this state that the individual unorganized worker shall be free to decline to associate with his fellows and that he shall be free from interference, restraint, or coercion on the part of his employer. This must mean *that no labor union may demand that an employer require his employee to join such union*, because no employer has the right to require an employee to join or refrain from joining a labor union. *Any person or group which undertakes to coerce an employer to do that which is contrary* to the express public policy of this state thereby undertakes to compel the performance of an unlawful act. The lawful weapon of peaceful picketing may not be utilized to accomplish such an unlawful purpose. It is quite immaterial that the things done to bring about the unlawful purposes were not *per se* unlawful. This is our interpretation of our statute.

In *McKay* v. *Retail Automobile Salesman's Local Union No. 1067*, supra, the District Court of Appeal for the First District of California, considered a statute substantially like ours and reached the same conclusion. After exhaustively reviewing the cases and discussing the principles involved, the course said:

> "When acting thus under the statute any 'individual workman' or group of individual workmen has the right to bargain with his employer 'free from the interference, restraint, or coercion' of the employer, directly or indirectly. The statute having fixed the duty of the employer in such matters, no 'individual workman' and no group of employees or others may force the employer to breach that duty by picket, boycott, secondary boycott, or any other means. The privilege of 'freedom of association, self-organization, and designation of representatives of his own choosing' is the meat of the

declared state policy, and this is a substantial right which may be protected by injunction. To this end the State has declared that it is for the greatest benefit of the employer and the employee, and the general public at large, that controversies over conditions of employment should be settled by negotiation, arbitration, and conciliation, rather than by force or intimidation on the part of either employer or employee. We should add that we are not expressing herein our own philosophy in relation to the many controversies arising between employers and employees, nor to those arising between certain groups of employee organizations. We are merely stating the policy the legislature has adopted as the law controlling such relations."

In this connection, see also: *Fornili* v. *Auto Mechanics Union, etc.* (1939, ——— Wash. ———, 93 P. (2d) 422; *Swing* v. *American Federation of Labor et al.* (1939), ——— Ill. ———, 22 N. E. (2d) 857; *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers Union* (1939), 371 Ill. 377, 21 N. E. (2d) 308.

The facts are not here in dispute. The court found from the evidence (which is not before us) that the plaintiff had performed all obligations imposed upon him by law; that he was at peace with his employees; that none of them belonged or wanted to belong to the picketing union; *and that the object of the picketing complained of was to compel the plaintiff, against his desire, to sign a closed shop contract, whereby his employees would be compelled to join the union against their will or be discharged, which, as we have already pointed out, the plaintiff was prohibited from doing by positive law. Under these circumstances, the picketing was wrongful and oppressive and it ought to have been enjoined.*

The trial court's attempt to substitute a form of picketing which it thought would be proper can not be justified for several reasons. The picketing of plaintiff's place of business for the purposes for which it was done would not have been made proper by the use of the sign suggested by the court; the relief granted was without the scope of the issues;

and, *if* picketing had been proper, it could not have been the function of the court to prescribe the form, context, and character of the sign that might be displayed. The privilege of free speech carries with it freedom of choice as to the mode of expression that may be employed.

Reversed, with directions to the trial court to restate its conclusions of law in harmony with this opinion, and to modify the temporary injunction accordingly.

APPENDIX C

Second Opinion: *Local Union etc.* v. *Roth* decided Feb. 24, 1941 218 Ind. 275, 31 N. E. (2d) 986.

Omitting Caption

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

Fansler, J.

Richman, J., not participating

This is an appeal from the final judgment enjoining the appellants from picketing the premises of the appellee. The case was here before on an appeal from an interlocutory order granting a temporary injunction. (See *Roth* v. *Local Union No. 1460 of Retail Clerks Union et al.* (1939), 216 Ind. 363, 24 N. E. 2d 280.)

On the trial of the application for a temporary injunction, the court found the facts specially. Upon the appeal the evidence was not brought before us, and the cause was decided upon the basis of the facts disclosed by the special findings. From the facts shown, it was concluded by this court that the three clerks who worked for Roth in his store were not members of the picketing union at the time the picketing began and at the time demands were made upon him to sign a closed shop agreement; that he had not interfered with the freedom of his employees to join or not to join the union; that he was refusing to interfere or to sign a contract, by the terms of which he agreed to require his clerks to join the union, upon the ground that to do so would require him to violate the expressed statutory public policy of the state (Acts 1933, ch. 12, Sec. 2, p. 28, Burns' Ind. St. 1933, Sec. 40-502, Baldwin's Ind. St. 1934, Sec. 10156), which declares that employees "shall be free from interference, restraint, or coercion of employers"; that the purpose of the picketing was to coerce him to violate this declared public policy under penalty of having his business destroyed by the picketing.

Upon the present appeal, the evidence is brought into the record.

The sufficiency of the evidence to sustain the special findings is challenged, and it is asserted by the appellants that there is no evidence to sustain the finding that the signs carried by the pickets "are designed to convey to the public and plaintiff's customers the idea that plaintiff refuses employment to, or discriminates against members of defendants' union, which idea implies representations which are false and in fact operate as a fraud upon plaintiff, his employees and the public." This assertion directed attention to the evidence.

The appellee, as plaintiff below, called as a witness one of his clerks, Dorothy Carlson. She testified that she went to work for Roth, when he opened his store in January, 1939, as a grocery clerk; that she joined the defendant union in March, 1939; that, before joining, a representative of the union talked to her, and told her that if she refused to join pickets would be put in front of the store, and that she would be out of a job if that was done; that because of this threat she joined the union. She was still a member of the union on the morning of *May 17, 1939*. On that morning she came to work about 8 o'clock. Shortly after 8 o'clock a representative of the union came to her and told her to go out and picket. She told him that she would not, and he told her it would cost her a $50 fine. Shortly thereafter, at about 8:30 o'clock on the same morning, the picket line was established. The witness did not leave the store until about 11:30 o'clock, when she went out to lunch. She came back at approximately 12:30 o'clock. The picket line was still operating. At about 2:30 o'clock in the afternoon, Roth handed his clerks a letter and told them to read it. This letter was typed, ready for signature, and reads as follows:

"Hammond, Indiana, May 17, 1939

"Retail Clerks Union, Retail Clerks International Protective Association,

"Gentlemen:—

"The undersigned hereby resigns from your association and severs all connection with your association and all of your agents, effective immediately. You and all of your agents are forbidden to represent the undersigned in any manner."

She read this letter and signed it. The other two clerks, Wellington A. Barnes and Meyer Kaplan, signed it before her. After she signed it, she gave it back to Roth. On cross-examination, she was asked:

"Q. Had you any intention of resigning from the local union prior to the time you were handed this document? A. Why, I didn't want to belong in the first place.

"Q. Had you any intention of resigning from the local union prior to the time you were handed this document? A. If possible, I would have.

"Q. What do you mean by 'if possible?' A. Well, I could figure no way to get out of the union without having them raise a lot of trouble in the store.

"Q. I see. Did you take it to mean, when Mr. Roth handed you this letter, that he wanted you to sign it? A. Why, I understood that, yes.

"Q. Did you have any information that this letter existed prior to the time Mr. Roth handed it to you?"

There was an objection the question, and, when it appeared that it might be sustained, the question was withdrawn. She was then asked:

"Q. Had you ever talked to Mr. Roth about this letter before you signed it? A. No, I did not.

"Q. Had you ever talked to Mr. Roth about the possibility of resigning from the union before you signed this letter?"

There was an objection to this question, which was not answered. Then the court said:

"Well, I will ask the young woman. In fact, I presume you are not a typist. Do you use a typewriter? A. No, sir.

"The Court: You did not type this letter yourself, personally?

A. No, sir.

"The Court: She said she did not write the letter."

She was then asked:

"Q. Was this document typed at your direction?"

There was an objection, and, after some discussion the question was withdrawn.

In the discussion of counsel concerning objections to these various questions, counsel for the defendants said: "We should like to know if she had any information about it beforehand." The court inquired: "Why? What is the materiality of that"? And the defendants' counsel replied: "For the reason, if the court please, it may be this thing was talked over prior to the time this lady signed." Counsel for the plaintiff said: "Of course it was talked over." Defendants' counsel said: "If it was, I would like to know what the conversation was."

The rulings on the objections to these questions are not assigned as error. They are referred to show that the examination of this employee, seeking to disclose the origin of the letter of resignation from the union, and by whom it was inspired, was unduly curtailed. The witness was brought forward by the plaintiff, Roth, who did not take the stand and deny any of her testimony. The other two clerks were not called as witnesses.

After the letter was signed and delivered to Roth, it was mailed to: "Retail Clerks Union, Retail Clerks International Protective Assn., Indiana Hotel Bldg., Hammond, Ind."

by registered mail. The envelope bore the following names and return address on the upper lefthand corner: "W. A. Barnes, Meyer Kaplan, Dorothy Carlson, 5823 Calumet Ave., Hammond, Ind."

It is clear from this undisputed evidence that at the time the union demanded that Roth sign a closed shop contract, and at the time the picketing began, all of Roth's clerks were members of the picketing union, and continued to be members for at least several hours thereafter; that Dorothy Carlson, and, it may be inferred, the other two clerks, never saw the letter of resignation until it was handed to them by Roth; that she at least, and probably the other two, had not planned to resign until presented with the document. When it is considered that the signers of the letter were grocery

clerks in a small grocery, the language of the letter and its construction clearly indicate that it must have been prepared by some one else. It clearly indicates that Roth's employees were not "free from interference," as the public policy statute upon which he relies requires that they should be. Nor can it be confidently said that they were free from coercion. They understood that Roth wanted them to sign the letter. A request sometimes has the force of a command. Failure to comply with an employer's request may mean loss of employment. This undoubtedly is the reason for the statutory provision that employees shall be free from interference in matters affecting their joining or refusing to join labor organizations.

These facts establish a case differing substantially and materially from the one disclosed by the special findings. From the special findings it appears to be a case in which a labor union seeks, by picketing, to coerce an employer to require his employees who are not members of the union to join the union upon penalty of being discharged. But it is not such a case. At the time the picketing began its purpose was to coerce an employer, all of whose employees were members of the picketing union, to agree that in the future he would employ only union members. The right to an injunction under such circumstances was denied in *Scofes et al* v. *Helmar et al.* (1933), 205 Ind. 596, 187 N. E. 662.

By the time the case was tried the situation had changed. The employer had interfered and aided and encouraged his employees to sever their connection with the union. This conduct is a violation of the very public policy statute which the appellee relies upon as entitling him to an injunction. He says in substance: "Being a law-abiding citizen, I refuse to interfere or coerce my employees to join a union to which they do not belong. The law forbids that I do so. Therefore it is unlawful for this union to seek to coerce me to violate the law by picketing me as unfair to union labor. It would be unfair for me to interfere or coerce my employees." But the fact is that he has not been law-abiding with respect to the statute. He has interfered and intermeddled; he has encouraged, if not coerced, his employees, which conduct is a violation of the statute upon which he relies for protection

against picketing. Under the public policy declared by that statute, he has been unfair, and the banner carried by the picket speaks the truth. He may not insist that the appellants be required to conform to a public policy to which he, himself, refuses to conform.

Appellants' objection to the special findings was sufficient to direct our attention to the evidence. The objection was vague and did not point specifically to the testimony of Dorothy Carlson, but the true facts being disclosed by our examination of the evidence, we may not ignore them. The appellee was the plaintiff, seeking the aid of a court of equity. He had the burden of establishing facts which entitled him to injunctive relief. The testimony of his own witness discloses that he is not entitled to an injunction. The special findings do not reflect the true situation. They are not supported by the evidence.

Judgment reversed, with instructions to dissolve the injunction and to grant appellants' motion for a new trial.

Richman, J., not participating.

APPENDIX D

Third Appeal

OPINION AND JUDGMENT DECIDED BY THE INDIANA SUPREME COURT ON THE 5th DAY OF MARCH, 1942.

Local No. 1460 of Retail Clerks Union, Retail Clerks International Protective Assn., Thomas Day and Vernon Housewright, Appellants v. *Aaron Roth*, Appellee ——— Ind. ———, 39 N. E. (2d) 775.

The general character of this controversy may be learned from the opinions in the two former appeals, *Roth* v. *Local Union No. 1460 of Retail Clerks Union* (December 22, 1939, 216 Ind. 363, 24 N. E. (2d) 280, and *Local No. 1460 of Retail Clerks Union* v. *Roth* (February 24, 1941), 218 Ind. 275, 31 N. E. (2d) 986. In the first appeal we ordered modified an interlocutory order granting temporary injunction. In the second we reversed a final decree granting a permanent injunction and ordered a new trial which has since been had with special finding of facts and conclusions of law on which again a final decree was entered granting a permanent injunction from which this third appeal is taken.

If the facts now are substantially the same as in the second appeal we need not restate the applicable law for the second opinion will remain the law of the case. 5 C.J.S. Appeal & Error Sec. 1821, p. 1267.

The factual basis for the opinion is epitomized in the sentence: "The employer had interfered and aided and encouraged his employees to sever their connection with the union." (218 Ind. at p. 281)

Now it is claimed that they had ceased to be members a few hours prior to his interference. This claim is predicated on the statement of the union's agent to two of the clerks that if they did not strike it would cost them $50 to get back in the union. They testified that they understood therefrom that they were no longer members and therefore regarded the signing and mailing of the letter of resignation as merely a formal notification of a prior severance of their rela-

tions with the union. Hence appellee asserts he was guiltless of interference with that relationship.

We doubt the authority of an agent of the union to expel its members in such a casual manner. We doubt also the power of a member to repudiate his status by a mental process of which the union is not informed. But assuming that the clerks thought that they were no longer members, it does not appear that any such thought was in the mind of the employer when he handed them the letter addressed to the union informing it that the three clerks thereby resigned. Persons do not resign from an organization with which they are not connected. The letter assumes the present existence of a relationship which it proposes to dissolve.

In the former opinion we commented upon the fact that none of the clerks knew about the letter until it was handed them ready for their signatures and that its source was a mystery. In the retrial appellee had the opportunity of producing evidence to rebut any erroneous inference we may have drawn from the facts and from his unexplained connection with the letter. But he did not choose to testify. Nor was his conduct in anywise explained. There is no change in the evidence as to what he did. Miss Carlson changed her testimony as to what she thought when he handed her the letter. But her thoughts do not characterize his action. While there may be some doubt from the evidence that she or the other clerks were in fact coerced, there is no escape from the conclusion that their employer interfered and aided and encouraged his employees to sever a connection with the union which he thought existed, and this at the time of the picketing which he sought to enjoin. We think the facts are substantially the same as related in the second opinion which therefore is the law of the case.

The decree is reversed with instructions to set it aside, restate conclusions of law in harmony with this opinion and enter a decree that appellee take nothing and appellant recover its costs.

(17)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 181

AARON ROTH,

Petitioner,

vs.

LOCAL No. 1460 OF RETAIL CLERKS UNION, RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, THOMAS DAY, and VERNON HOUSEWRIGHT,

Respondents.

REPLY BRIEF SUPPORTING PETITION FOR CERTIORARI.

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REPLY BRIEF SUPPORTING PETITION FOR CERTIORARI.

The petition for certiorari embodies within itself a supporting brief. Respondents have filed a brief in opposition, to which petitioner makes this reply:

STATEMENT OF MATTER INVOLVED.

Respondents' brief does not deny:

(1) That petitioner's recital of the uncontradicted evidence at pages 11-18 of the petition is correct.

(2) That respondents' answer (R. 7) tendered *no issue* about petitioner being guilty of coercing his employees to resign from the union; and that Indiana law forbids any State Court, including the Supreme Court, to decide a case on an issue not pleaded, which the Supreme Court actually did. (See petition, 21, top.)

(3) That the Indiana Supreme Court's decision in the first appeal of this case (216 Ind. 363) lays down a construction of the Indiana labor injunction statute, which has never since been modified. (Petition, 27.)

(4) That the Indiana Supreme Court has denied petitioner his rights under said statute as thus construed, on the alleged ground that he is guilty of coercing his employees to resign from the union, and except for this alleged guilt he would be entitled to the protection of said statute as construed in the first appeal, the same as other Indiana citizens.

(5) That the last opinion compels petitioner to become a law-breaker and to join the union in violating the law laid down in the first appeal, in order to prevent certain destruction of his business and property rights.

Respondents' brief, like the opinion appealed from, camouflages the simple, stark charges of the petition by detailing facts which are either immaterial or false, to-wit:

(1) That petitioner is a member of a grocers association (Brief, 2).

Respondents' answer tenders no issue on this subject nor asserts any grievance or rights

against petitioner on account of such membership. (R. 7.) Nor do any of the three opinions base the decision on this fact, or so much as refer to it. (R. 18, 41, 117.) The Indiana statute, like its prototype, the Norris-LaGuardia Act, expressly confers on employers the right of such membership.

> Section 40-504(b), Burns Indiana Statutes of 1933.

(2) That petitioner refused to sign the contract because he had given his word to his association not to do so (Brief, 2).

This, like the charge in Paragraph (1) above, is neither pleaded in respondents' answer (R. 7), nor referred to in any of the three opinions. (R. 18, 41, 117.) On the contrary, the first opinion holds that he *ought* to refuse to become a party to the union's unlawful scheme of coercing his employees. If a man refuses to do an unlawful thing, he is in the right, regardless of what motives prompted his refusal.

(3) That the picketing was "free from *fraud*, violence or *any unlawful conduct.*" (Brief, 2, bottom.)

The picketing made *false representations* to the public, as expressly found in Finding No. 1 (R. 48, top), and as clearly indicated by comparison of the "unfair" label applied to plaintiff, with the following undisputed facts: that his labor standards were superior to the Union's and superior to the community standard, that respondents asserted no grievance against him, except that he refused to sign, and that the sole

object of the picketing was to compel the signature of a contract to coerce employees contrary to Indiana law. (R. 74, 75, 76, 82, 89, and 113.)

(4) That petitioner "*caused to be prepared* a written resignation * * * accompanied with a request that his clerks *read* the same." (Brief, 2.)

There is no evidence that petitioner prepared the resignation, or who prepared it, or that he said anything to his clerks about reading it. The evidence is merely that he handed this paper to Dorothy Carlson, after having already *told all the clerks to do as they pleased about the union*, and the clerks thereafter acted entirely on their own volition and welcomed the document as a desired means of escape from coercive membership which they had already repudiated by word and deed. (See summary of evidence in petition, 11-17).

This case does not turn upon any such trivial details as above listed, which respondents emphasized in the opening pages of their brief. It turns upon the grave charge that the Indiana Supreme Court has *discriminated* against petitioner, and excluded him from the equal protection of Indiana law on the *fictitious* ground that he is guilty of coercing his employees to resign from the union, and hence is beyond the pale of the law.

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is invoked on the clear charges stated in the preceding paragraph, and respondents' brief admits at page 7 that jurisdiction can be invoked on such a ground.

But respondents then go on to make a false statement of what petitioner *claims*. They say at the bottom of page 7 that he bases his constitutional right on the ground that "none of his employees were *members* of the union *at the time the picketing began.*" (Brief 7, bottom; 8, bottom.) The utter falsity of this statement of petitioner's claim is demonstrated by referring to pages 7-11 of the petition.

While the main excuse offered in the last two opinions, and also in respondents' brief, for denying petitioner relief, is that he was guilty of employee-coercion, there is also woven into this theme a secondary one about the employees having been members "at the time the picketing *began.*" The undisputed evidence is that whatever membership then existed was a *coercive* one, which the employees had already repudiated by word and deed as fully as they knew how, before the picketing began on the morning of May 17, 1939; after which on the afternoon of the same day they signed a formal written resignation and sent it by registered mail to the Union, which received it the next day on May 18. (R. 93, 94.) Respondents cannot derive any benefit from this former coercive membership unless the court is prepared to let them profit from their own wrong. Moreover, in their answer they asserted no such profit, nor made any contention that their rights were enlarged by this former membership. (R. 7.)

What the Facts Were When Petitioner Filed His Suit.

But the *status had crystallized*—all of the above facts had occurred, including delivery of the formal resignation,—*before* petitioner filed his suit for temporary and permanent injunction on May 18, 1939. (R. 4.) His right to maintain the suit depended upon the status of the parties *then* existing—not on some closed chapter of the story. (Otherwise, if picketing started lawful in character, it never could be enjoined at a later stage, even if it turned unlawful.) Moreover, respondents' answer filed four days after the suit was begun, admits "that plaintiff's employees have no labor organization of their own and *are wholly unorganized.*" (R. 7, 8, top.) Further, respondent Housewright testified that the sole object of the picketing was to compel the signature of the contract whereby petitioner would be obliged to coerce these employees to re-join the union. (R. 113, top; R. 96.)

Apparently the reason for all this straining in the second opinion and in respondents' brief to emphasize the union *membership* of these employees is an attempt to bring this case within the rule of *Scofes* v. *Helmar*, 205 Ind. 596. But that case has no bearing on ours because:

1. The Indiana Supreme Court ignored the *Scofes* case in its first opinion, 216 Ind. 363, (though that case was cited and urged by respondents).
2. In the *Scofes* case two union employees *struck* when the picketing began (205 Ind. at p. 598, middle). They struck to enforce maintenance of union standards (p. 600, top). But in our case, all employees refused to strike, the employer's standards were superior to the union's, and the object was solely to coerce the employees.

3. The *Scofes* case was decided under the old common law of Indiana, before the Indiana labor injunction statute was passed.

4. This statute, as construed in the first opinion, (216 Ind. 363), supersedes the common law and all earlier cases to the extent of conflict (if any). This construction is that a union cannot coerce an employee into joining (or re-joining) and cannot force the employer to be a tool in this unlawful enterprise.

QUESTIONS PRESENTED.

Under this heading respondents repeat the false statement that petitioner "caused" the resignation to be prepared (Brief, 10), without citing any record to sustain it. (However, the identity of the draftsman is a sham issue, in view of the uncontradicted testimony of the employees that they were not influenced by this consideration, and in view of the fact that this is still a free country where employers and employees are still permitted to communicate with each other, and where harassed employees are entitled to obtain a *desired* form of resignation from any draftsman.)

None of the three questions listed by respondents are presented by our petition, namely:

(1) Is the union's demand lawful under the Indiana statute?

That statute was construed by the Indiana Supreme Court in the first opinion (216 Ind. 363), as that court had a right to do, even though its interpretation be different than what the

Supreme Court of the United States might have placed on a similar statute.

Senn v. *Tile Layer's etc. Union*, 301 U. S. 468, 477; 57 S. Ct. 857, 861.

Detroit etc. R. Co. v. *Fletcher Paper Co.*, 248 U. S. 30; 39 S. Ct. 13.

This power to interpret state statutes is absolute in the state court unless the statute, as construed, violates the Federal Constitution. Respondents can hardly argue that the Constitution is violated by a statute preventing them from *coercing* unwilling workers into their union. There is no constitutional guaranty of the *right of coercion*, particularly in view of the recent decisions of this Court cited at page 28 of the petition. Hence, no question of statutory construction is presented to this Court.

(2) "Can the State of Indiana exclude workingmen from peacefully exercising the right of free communication?"

This likewise is a false issue. The statute as construed in the first opinion does not forbid free speech but forbids union *coercion* of workers under the *pretext* of free speech. Such a statute is constitutional. (See cases at page 28 of petition.)

But no "free speech" question is presented by this record, because:

(a) The record is bare of any evidence that the *object* of the picketing is to advertise or communicate anything to anybody.

(b) Respondent Housewright testified that the *sole object* was to *coerce* signing the unlawful contract. (R. 113, 96.)

(c) The second and third opinions do not deny petitioner relief on the ground of "free speech," but upon the false pretext that he is a law-breaker.

(3) "Is petitioner entitled to injunctive relief, under the Act, *when he is guilty* of interfering, aiding and encouraging his employees to sever their connections with the respondent Union?"

This begs the question. The primary question is: Did the Indiana Supreme Court falsely accuse him of guilt, and thereby exclude him from equal protection of the law? The secondary question is: Even if he were guilty, could the court deny him and his property protection, thereby imposing limitless loss regardless of the triviality of the offense, and thereby encouraging him to turn law-breaker in order to obtain relief?

REASONS FOR ALLOWANCE OF WRIT.

The *utter falseness* and preposterousness of the Indiana Supreme Court's accusations against petitioner is emphasized (1) by respondents' failure to deny the correctness of our summary of evidence at pages 11-19 of the petition, and (2) respondents' total failure to cite any record to support the accusation.

That is the question presented. It is stark and fundamental,—a citizen denied protection of law and his property destroyed on a sham pretext, by the state. Such a petition deserves careful investigation by this Court. All that is required at this stage is for petitioner to make a *prima facie* showing. He has done far more than that.

Labor questions will arise in this case only secondarily, if at all. The Indiana statute as construed in the first opinion has every appearance of being valid; but even if it were invalid, the state could not exclude petitioner from its protection on a false pretext, while leaving the statute in operation for the benefit of other citizens. This basic question must not be obscured by the alleged labor questions set forth in respondents' brief.

Therefore, it is respectfully submitted that the petition should be granted.

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